

July 30, 2021

Submitted via FOIA online at: <https://foiaonline.regulations.gov>

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

RE: Freedom of Information Act Request - Bioenergy Devco

Dear Freedom of Information Act Officer:

This request is being submitted on behalf of the Socially Responsible Agriculture Project ("SRAP") for records related to the proposed Bioenergy Devco's development at a site, formerly known as Perdue Agri Recycle, located at 28338 Enviro Way near the town of Seaford in Sussex County Delaware and/or its affiliated subsidiaries and development partners, including but not limited to: Bioenergy Innovation Center; BTS Biogas; BTS North America (BTS NA); Chesapeake Utilities Corporation (CPK); Eastern Shore Natural Gas, Chesapeake Utilities and Marlin and/or associated projects within the Delmarva Peninsula (i.e., Delaware, Maryland, Virginia).

We believe Bioenergy Devco's development will include a biogas processing facility and that its associated operations will include gas pipeline infrastructure leading to and from the site near Seaford, Delaware and across the Delmarva Peninsula. Together and for the purposes of this FOIA, we request all records that apply to these facilities, which are referred to herein as "Devco." We seek this information in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*

A. Records Requested

The records requested include, but are not limited to, printed or written correspondence, communications, books, papers, photographs, email or other machine readable electronic record, telephone messages, voice-mails or other sound recordings, notes of personal conferences, telephone conversations or personal meetings, inter-agency or intra-agency communications, minutes, deeds, studies, reports, environmental impact reports, economic impact reports, environmental justice inquiries, maps, diagrams, applications, incentives, including any financial incentives, programs, subsidies, or loans. This request is intended to include records sent, received, or generated or received by any USEPA representative, division, department, or commission.

Unless otherwise indicated, we seek records dated from January 2018 through today.

Specific Records Requested

1. Internal DNRC communications (i.e., emails, letters, meeting notes, etc.) and external communications between USEPA and any local, state, and federal

agencies and/or Devco representatives or any Devco subsidiaries, and/or any other private parties that specifically relate to the proposed project. This includes any records regarding on-site facility inspections; communications relating to USEPA's requests for and/or approvals of any applicable environmental permits, such as those for discharges into state surface or groundwater, air, etc.; facility construction permits; enforcement-related inspection records, internal and external communications regarding the Devco biogas development with other regulatory entities, such as the State of Delaware's Department of Natural Resources and Environmental Control (DNREC) or other state environmental agencies, etc.

2. Any Devco plans, proposals, applications, documents, communications, negotiation documents or records as they relate to any federal environmental programs administered by EPA, EPA Region 3 and/or the states, and other related documentation applicable to the Devco tri-state development project.

Again, we are limiting this request to information on file that dates from January 1, 2018 through today. Said records should include all permits which have been transferred and/or amended to Bioenergy Devco or related LLCs from former owners Chesapeake Agrisoil/Perdue and all active permit records for the development site on Enviroway in Seaford/Blades for the biogas/compost project, as well as any ancillary developments connected to Devco's tri-state biogas project.

Our request is not meant to be exclusive of any other records that, although not specifically requested above, have a reasonable relationship to the subject matter of this request. If USEPA determines to withhold any documents that could be reasonably construed to be responsive to this request, or has destroyed any such records, we ask that you indicate this fact and the reasons therefore in your response.

B. Exempted and Nonexistent Documents

Please include in your response an explanation of which documents, if any, may be privileged or exempt from this FOIA request and why. 40 C.F.R. § 2.104(f). If you should seek to prevent disclosure of any of the requested records, please justify your refusal by referring to the specific exemption that you are invoking under the FOIA. *Id.* § 2.104(h)(2). Also, please provide those portions of the documents with information related to this request that are not specifically exempted from disclosure. If the documents do not exist, please indicate that in your written response. W

C. Instructions for Record Delivery

Please provide the requested records as you collect and review them. To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive the documents electronically, by email. If electronic copies are unavailable, we will accept paper copies. Please send all records to mariap@sraproject.org.

D. Request for Fee Waiver

SRAP request that you waive all fees in connection with this request. FOIA carries a presumption of disclosure and the fee waiver was designed specifically to allow nonprofit public interest groups, such as SRAP, access to government documents without the payment of fees. Federal courts have stated that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)). See also *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003). As shown below, SRAP meets FOIA’s two-pronged test for a fee waiver because disclosure of the requested documents is both in the public interest and not primarily in the commercial interest of SRAP. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

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1. Disclosure of this Information is in the Public Interest Because it Will Significantly Contribute to Public Understanding of the Operations or Activities of the Government.

SRAP qualifies for a fee waiver because the requested information is likely to significantly contribute to the public understanding of government operations or activities. Under FOIA the fee associated with the document production is waived if the release of the information is in the “public interest.” 5 U.S.C. § 552(a)(4)(A)(iii) (“documents shall be furnished without any charge . . . if disclosure of the information is in the public interest”). Pursuant to EPA’s implementing regulations at 40 C.F.R. § 2.107(l)(1)(c), EPA must consider whether (1) the subject of the request concerns the operations or activities of the government; (2) disclosure is “likely to contribute” to an understanding of government operations or activities; (3) disclosure will contribute to public understanding of a reasonably broad audience of persons interested in the subject; and (4) the resulting contribution to public understanding of government operations or activities is likely to be significant. Because disclosure of the information SRAP requests herein meets these four factors, disclosure is in the public interest and SRAP should be granted a fee waiver.

a. The subject of SRAP’s request directly and clearly concerns “the operations or activities of the government.”

SRAP’s request concerns the operations and activities of the government. 40 C.F.R. § 2.107(l)(2)(i). The requested documents relate to EPA’s actions under the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), etc., which are intended to ensure the protection of the environment and human health. Whether the development is in compliance with EPA’s regulations under those statutes and the actions EPA has taken or may take to determine the compliance status are precisely the type of agency operations and activities contemplated by the FOIA fee waiver provision.

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b. Disclosure of the requested information is “likely to contribute” to an understanding of government operations or activities.

The information requested by SRAP is likely to contribute to an understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). To the best of SRAP’s knowledge, the requested information is not already in the public domain. The information contained in the requested documents will provide an otherwise

unavailable window regarding EPA's implementation of its investigation and enforcement authorities under federal environmental regulations. This information will not only allow the public to understand the results of EPA's compliance investigation activities, but will provide the public the opportunity to review EPA's process for initiating such activities and determining what remedial steps, if any, are warranted. Such information is critical for the public to be assured that EPA's regulations are being implemented as Congress intended. Thus, the requested records will be "meaningfully informative" about EPA's operations and activities.

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c. Disclosure of the information requested by SRAP will contribute to public understanding of the subject.

The requested information will contribute to public understanding of the subject. Information that could "support oversight of [an agency's] operations" is the type of information that Congress considered to have a "high potential for contribution to public understanding." *McClellan Ecological*, 835 F.2d at 1286.

SRAP is a national organization, and will provide this information to its members, supporters, and advocacy networks within Region 3 and nationwide, thus contributing to the public's understanding of this subject. SRAP intends to disseminate information gleaned from the disclosed records to its members and the general public through a vast array of diverse and highly effective channels, including: SRAP's and its affiliates' newsletters and websites; press releases; traditional media outlets, and through presentations at conferences; letters and emails to SRAP supporters, as well as through social media such as Facebook and Twitter accounts. SRAP will also provide the information to members of the local environmental justice community that lives near the development site, as well as other local groups that could be impacted by improper regulation of the facility. With the analytical input from SRAP, the requested documents will significantly enhance the public's understanding of the EPA's oversight activities, and any attendant issues concerning biogas development effects on neighboring communities, natural resources, and water and air quality, among others. *See Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 814 (2d. Cir. 1994) (observing that the relevant inquiry is "whether [the] requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject"). *See also Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (finding requester's publication of online newsletter and intent to create website using requested records, among other things, sufficient for dissemination purposes).

SRAP intends to analyze the documents provided to ensure that EPA is appropriately monitoring and investigating existing and proposed pollution sources for compliance and/or the state's implementation of federal regulations as they apply to such. We also have an interest in providing the public with information regarding the development's impacts to local and regional air and water quality. SRAP is comprised of professionals with scientific and legal expertise who

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regularly write, speak, and teach on environmental compliance and other issues regarding environmental quality and agriculture before national audiences. SRAP is uniquely qualified to disseminate the requested information to a “reasonably broad audience of persons interested in the subject.” 40 C.F.R. § 2.107(l)(2)(iii).

d. The disclosure will contribute “significantly” to public understanding of government operations or activities.

Disclosure of records pertaining to EPA’s investigation, enforcement, and interpretation of its regulations as they apply to the Devco development is likely to “significantly” contribute to public understanding of EPA’s operations and activities in the region. 40 C.F.R. § 2.107(l)(2)(iv). The disclosure of the process EPA has used to conduct its investigations of the subject entities and the result of those investigations will contribute to public knowledge that did not exist pre-disclosure. None of the requested information is currently available to the public. SRAP’s subsequent analysis and dissemination of this information to the public will increase public understanding to a significant extent *See Ctr. For Biological Diversity v. OMB*, 546 F. Supp. 2d 722, 731 (N.D. Cal. 2008) (granting a fee waiver because “[m]ere knowledge of the weight [the OMB placed upon greenhouse gas emissions when it conducted its analysis] will significantly increase the public’s understanding”). It will shed light as to whether EPA and/or the delegated state authorities have appropriately regulated the Devco development to date and the results of that regulation, if any. SRAP has a consistent record of significantly increasing public understanding of the effects of federal agency action on large-scale industrial agriculture and animal agriculture facilities.

2. SRAP has no commercial interest in the requested information.

The second element of the fee waiver analysis addresses the requester’s “commercial interest” in the information. To determine if the request is made primarily for the commercial benefit of the requester, EPA’s regulations examine two relevant factors. 40 C.F.R. § 2.107(l)(3).

The first factor considered is “whether the requester has a commercial interest that would be furthered by the requested disclosure.” *Id.* § 2.107(l)(3)(i). As 501(c)(3) nonprofit, tax-exempt organizations, SRAP has no commercial, trade or profit interest in the material requested. SRAP will not be paid for or receive other commercial benefits from the publication or dissemination of the records requested. Therefore, SRAP does not seek this information for any use that furthers a commercial interest.

The second factor hinges on “the primary interest in the disclosure.” *Id.* § 2.107(l)(3)(ii). The identified commercial interest cannot be significantly more substantial than the public interest. *Id.* Because SRAP has no commercial interest whatsoever in the information requested, even a modest public interest will tip the balance in favor of a fee waiver. Here, there is great public interest in the release of the materials sought because they will provide previously unavailable information regarding EPA’s investigation, interpretation, and enforcement of its applicable environmental regulations as they apply to biogas production facilities and the potential impacts of such on the

environment and human health. Thus, assuming *arguendo* that SRAP has some “commercial” interest in the documents requested, a complete fee waiver would still be appropriate because SRAP’s primary interest in the material is to inform the public about the operations and activities of EPA that affect environmental quality and public health. Therefore, the disclosure of the information is not “primarily in the commercial interest of” SRAP, and a fee waiver is appropriate.

E. Conclusion

As FOIA requires, we expect your response within twenty working days of your receipt of this request. In the event you have any questions concerning the type of materials we are interested in receiving, please contact the undersigned SRAP Regional Representative, Maria Payan.

Thank you for your assistance in this matter. We look forward to hearing from you.

Respectfully:

Maria Payan, Senior Regional Representative
Socially Responsible Agriculture Project
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